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September 16, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY HAND DELIVERY

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
Room 222
1919 M St. N.W.
Washington, D.C. 20554

Re: Comments of *ntta.com, inc.*,
*In the Matter of 1998 Biennial Review, Reform of the
International Settlements Policy and Associated Filing
Requirements*, IB Docket No. 98-148;
Regulation of International Accounting Rates,
CC Docket No. 90-337.

Dear Ms. Salas:

Enclosed for filing are an original and seven (7) copies of the comments of *ntta.com, inc.* in the above-referenced proceedings. Please file-stamp the marked copy and return it to our office with the messenger.

As directed in the Notice of Proposed Rulemaking issued in these proceedings, we simultaneously are submitting a copy of these comments on computer diskette to the International Bureau and to International Transcription Service.

If you have any questions regarding this filing, please contact the undersigned.

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Ms. Magalie R. Salas
September 16, 1998
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Thank you for your assistance with this matter.

Respectfully submitted,

HOGAN & HARTSON L.L.P.

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Joel S. Winnik

Enclosures

cc: Ms. Regina Keeney, International Bureau
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Mr. Troy Tanner, International Bureau
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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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)	
1998 Biennial Review --)	IB Docket No. 98-148
Reform of the International Settlements)	
Policy and Associated Filing Requirements)	
)	
Regulation of International Accounting Rates)	CC Docket No. 90-337

COMMENTS OF *ntta.com, inc.*

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Dated: September 16, 1998

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COMMENTS OF *ntta.com, inc.*

ntta.com, inc. ("*ntta.com*"), 1/ by its attorneys, hereby submits these comments regarding the Notice of Proposed Rulemaking ("NPRM") issued in the above-captioned proceedings on August 6, 1998.

INTRODUCTION AND SUMMARY

ntta.com commends the Commission's recent efforts to reform and streamline its regulation of international common carriage. In particular, *ntta.com*

1/ *ntta.com*, a Delaware corporation, holds authorizations under Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, to operate as a facilities-based carrier and reseller of international telecommunications services between international points. *ntta.com* is a wholly-owned subsidiary of NTT America, Inc., which in turn is a wholly-owned subsidiary of Nippon Telegraph and Telephone Corporation ("NTT"), a corporation which is organized and operated under the laws of Japan and which provides domestic telecommunications services in Japan. Wholly-owned subsidiaries of NTT, NTT Worldwide Network Corporation and NTT Worldwide Telecommunications Corporation, have recently entered the Japanese international telecommunications market providing facilities-based and resale services, respectively.

supports the goal of the NPRM initiating this proceeding: to eliminate burdensome and unnecessary regulations connected with the International Settlements Policy (“ISP”). These reforms are appropriate in light of the increasingly competitive global telecommunications marketplace being established under the World Trade Organization (“WTO”) Basic Telecommunications Agreement ^{2/} and related Reference Paper ^{3/} (collectively referred to as the “WTO Agreement”). Indeed, the Commission has recognized that the WTO Agreement is leading to the opening of telecommunications markets around the world. ^{4/}

ntta.com recognizes the Commission’s public interest obligations to protect consumers from anti-competitive practices. These goals may have been well-served in the past by policies such as the ISP, No Special Concessions rule, and other restrictions. But in light of the major reforms taking place in the WTO environment, these restrictions now may have the effect of burdening, rather than protecting, competition. Thus, in light of the implementation of liberalization in the

^{2/} The results of WTO negotiations regarding basic telecommunications services are incorporated into the *General Agreement on Trade in Services* (“GATS”), April 15, 1994, Marrakesh Agreement Establishing the WTO, Annex 1B, 33 I.L.M. 1167 (1994), by the *Fourth Protocol to the GATS*, April 30, 1996, 36 I.L.M. 366 (1997), and the Schedules of Specific Commitments attached thereto. The resulting agreement and the general GATS obligations are referred to herein as the “WTO Basic Telecommunications Agreement.”

^{3/} WTO Negotiating Group on Basic Telecommunications, *Reference Paper*, April 24, 1996, 36 I.L.M. 367 (“Reference Paper”).

^{4/} See, e.g., NPRM at ¶ 15.

WTO context, *ntta.com* respectfully suggests that the Commission consider adopting reforms that are even more far-reaching than those in the NPRM.

ntta.com supports the Commission's pro-competitive policy proposals in this proceeding, and the Commission's overall emphasis on eliminating regulations that are no longer necessary in light of increasing competition and liberalization around the world. *ntta.com* respectfully submits that the Commission should consider placing even greater reliance on market-based solutions, rather than antiquated regulatory approaches such as the ISP and related restrictions. Specifically, *ntta.com* would support the Commission's consideration of the following measures: (1) eliminating ISP requirements on all routes involving WTO member countries; (2) declining to adopt its proposal to apply the ISP based upon a concept of "market power" of foreign carriers, and instead eliminating such restrictions on the U.S. affiliates of all foreign carriers based in WTO member countries; and (3) permitting international simple resale ("ISR"), without restrictions, on all WTO member country routes. These objectives should, at a minimum, inform the Commission's deliberations on the proposals in the NPRM and other deregulatory alternatives.

In the pre-WTO environment, when most foreign carriers were monopolies and most foreign countries did not have pro-competitive telecommunications policies, policies such as the ISP and restrictions on ISR may

have been appropriate. ^{5/} Now, however, most of the United States' major trading partners are committed to opening their markets, and competition is growing on many other routes. In this increasingly competitive environment, restrictions on competitive entry and innovative inter-carrier arrangements will have the opposite of the intended pro-consumer effect. Indeed, keeping these restrictions in place risks creating the perception that the Commission cannot fully rely on the WTO Agreement, which in turn may undermine the confidence of other parties in that agreement.

While not all WTO member countries have committed, under the WTO Agreement, to fully opening their markets, the Commission has already determined that it will discard the effective competitive opportunities ("ECO") test with respect to all WTO member countries, even if they have made limited or no commitments. ^{6/} The Commission observed that "increased competition in global markets will increase pressure on all WTO Members to liberalize their telecommunications markets, . . . [and] the threat of harm from carriers from countries that have made limited or no commitments may not justify retaining the ECO test." ^{7/} This same rationale may support the Commission's adopting the

^{5/} In its *Foreign Participation Order, Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, 12 FCC Rcd 23,891(1997), *recon. pending* ("Foreign Participation Order"), the Commission modified its rules in this area only slightly -- but the core restraints remain intact.

^{6/} *Id.* at 23,907-908.

^{7/} *Id.*

broader reforms discussed above with respect to all WTO member countries. In the alternative, the Commission should establish these broader reforms as a goal, and proceed gradually with steps such as some of the more limited measures set out in the NPRM, as discussed below.

In order to prevent possible anti-competitive abuses, the Commission should rely primarily on the WTO Agreement, the mechanisms contained in the GATS, 8/ and most significantly, the discipline of an increasingly competitive international marketplace. The restrictions that the Commission now applies prophylactically should be applied, if at all, only to foreign carriers (or their U.S. affiliates) that the Commission has found to be engaging in anti-competitive practices that harm U.S. consumers, or to incumbent carriers from non-WTO member countries.

DISCUSSION

I. *ntta.com* SUPPORTS THE COMMISSION'S ISP DEREGULATORY INITIATIVE, AND RECOMMENDS THAT THE COMMISSION CONSIDER BROADER REFORMS.

A. The ISP Is Unnecessary with Respect to WTO Member Countries.

ntta.com supports the Commission's proposal to eliminate ISP requirements on routes to WTO member countries approved by the Commission for

8/ See GATS, Annex 1B, 33 I.L.M. at 1182 (Art. XXII- Consultation, Art. XXIII - Dispute Settlement and Enforcement).

ISR. 9/ For the reasons discussed below, the Commission should consider implementing even more far-reaching reforms and eliminating ISP requirements on routes to all WTO member countries.

While the ISP may have been a necessary market restraint in the face of *de jure* monopoly providers of telecommunications services, it may no longer be justified in the increasingly competitive WTO environment. The ISP was designed to prevent "whipsawing" of competing U.S. international carriers by foreign monopolistic carriers (and by extension, to protect U.S. consumers). It was intended to keep foreign monopolist carriers from taking advantage of their bargaining position *vis-à-vis* multiple U.S. carriers and extracting excessive settlement rates from the carriers. 10/

Under the WTO Agreement, however, many countries -- including most of the United States' major trading partners -- are in the process of eliminating anti-competitive conduct in the telecommunications marketplace, ensuring access to their market pursuant to a transparent regulatory regime, and requiring incumbent carriers to permit interconnection upon reasonable and non-

9/ NPRM at ¶¶ 25-27.

10/ See *Implementation and Scope of the Uniform Settlements Policy for Parallel Routes*, CC Docket No. 85-204, Report and Order, FCC 86-30, at ¶¶ 3-5 (released Feb. 7, 1986), *modified in part on recon.*, 2 FCC Rcd 1118 (1987), *further recon.*, 3 FCC Rcd 1614 (1988).

discriminatory terms. ^{11/} Thus, the large, established, foreign international carriers are facing growing competition. As a result, any discrepancy in bargaining power between foreign carriers and U.S. carriers, that previously may have enabled certain foreign carriers to engage in whipsawing and other anti-competitive practices, is being addressed. Thus, the circumstances that originally justified the ISP are changing, and its broad-based application is unwarranted. Instead, the proper mechanisms to protect U.S. consumers from anti-competitive activity abroad should be foreign countries' compliance with their obligations under the WTO Agreement, the dispute resolution mechanisms of the GATS, continued Part 43 general traffic reporting requirements ^{12/} to help identify anti-competitive behavior, and, where appropriate, the Commission's enforcement procedures.

^{11/} See GATS, Annex 1B, 33 I.L.M. at 1169-70, 1179-80 (Art. II, Most-Favored Nation Treatment; Art. III, Transparency; Art. XVI, Market Access; Art. XVII, National Treatment); see also Reference Paper, 36 I.L.M. 367 at ¶¶ 2.1-2.5 (interconnection). Japan, for example, has amended its Telecommunications Business Law ("TBL") in order to implement its commitments under the WTO Agreement by, *inter alia*, establishing open, transparent and non-discriminatory interconnection requirements. *Denki Tsuusin Jigyohu* (Telecommunications Business Law) (Law No. 86 of 1984, as amended) (attached as Exhibit B to the *Application of ntt.com inc., Under Section 214 of the Communications Act of 1934, as amended, for Authority to Resell Non-Interconnected Private Line Service Between the United States and Japan*, ITC-97-528 (filed Sept. 4, 1997) (see Section II.A of the application for a detailed discussion of the reforms undertaken in 1997). Moreover, Japan has never classified carriers based upon the nature of their foreign affiliates.

^{12/} 47 C.F.R. § 43.61.

The Commission's tentative proposal to eliminate ISP requirements on routes approved by the Commission for ISR goes in the right direction, and *ntta.com* would support it as an initial step toward broader elimination of ISP requirements. ^{13/} However, competition is the force that inherently should keep whipsawing in check. The Commission should consider applying the ISP and related restrictions to carriers from WTO countries *only* if the Commission has found them to be engaged in anti-competitive practices that harm U.S. consumers.

B. The Commission Should Re-Affirm Its Commitment to WTO Principles, Rather Than Applying Restrictions Like the ISP Selectively to a Class of Carriers That It Considers to Be "Dominant."

In an increasingly competitive environment, the Commission should consider relying more heavily on detection and enforcement mechanisms to combat proven anti-competitive behavior, rather than using prophylactic measures such as special ISP restrictions on U.S. carrier relationships with foreign companies based upon a concept of the foreign companies' "market power." Under the WTO Agreement, many countries, including most of the United States' significant trading partners, have committed to eliminating anti-competitive conduct in the

^{13/} NPRM at ¶¶ 25-27. We note, however, that use of the current ISR criteria essentially would tie the application of the ISP to the level of the accounting rate. Accounting rate levels may not be the best way to measure the extent of market liberalization, nor do they necessarily predict whether a foreign carrier can engage in whipsawing. Accounting rates are normally set bilaterally in negotiations that reflect costs and other factors, including regulatory policies.

telecommunications marketplace and to requiring reasonable and non-discriminatory interconnection under transparent regulatory supervision. ^{14/} More generally, the increasing competition in the new environment of the WTO will reduce the ability of carriers of any size from engaging in whipsawing or other anti-competitive practices. The Commission should consider applying restrictions only to carriers that it finds have engaged in such practices. To determine application of the ISP and the level of regulation of foreign-affiliated U.S. carriers based upon a concept of “market power” of the foreign operator ^{15/} appears to be inconsistent with fundamental WTO principles and goals. ^{16/}

Similarly, with respect to the No Special Concessions rule, currently applicable on all routes to carriers that the Commission classifies as “dominant,” *ntta.com* concurs with the Commission’s proposal to move away from applying this rule to ISR routes. ^{17/} But rather than just eliminating the rule only in those narrow instances, the Commission should consider going further and eliminating

^{14/} See GATS, Annex 1B, 33 I.L.M. at 1169-70, 1179-80 (Art. II, Most-Favored Nation Treatment; Art. III, Transparency; Art. XVI, Market Access; Art. XVII, National Treatment); see also Reference Paper, 36 I.L.M. 367 at ¶¶ 2.1-2.5 (interconnection).

^{15/} NPRM at ¶¶ 18-24.

^{16/} Cf. *infra* note 25.

^{17/} NPRM at ¶ 41. Under the proposal, the rule would continue to apply even on ISR routes to certain exclusive arrangements involving interconnection of international facilities, private line provisioning and maintenance, as well as quality of service. *Id.*

this restraint altogether with respect to carriers based in all WTO member countries. In the WTO environment, the interests of U.S. carriers and consumers will be protected by increasingly competitive markets and the transparent and non-discriminatory regulatory regimes of the many WTO member countries that have made pro-competitive commitments. The prophylactic need for the No Special Concessions rule no longer exists. Instead, the Commission should consider reserving such restrictions for those cases where there is proven anti-competitive conduct by a foreign carrier. 18/

More broadly, the Commission's international dominant carrier rules 19/ should be re-examined in the WTO context. A substantial number of countries have committed, under the WTO Agreement, to establish effective government regulation in order to address any anti-competitive behavior. And the

18/ In the *Foreign Participation Order*, the Commission stated that it "agree[s] with NTT's underlying premise that the reporting requirements [applicable to dominant carriers] will serve to deter, monitor, and detect anticompetitive behavior in the U.S. international services market." 12 FCC Rcd at 23,964. But contrary to NTT's suggestion, the Commission decided to apply these reporting requirements and the No Special Concessions rule as proscriptive measures due to what it called the "risk" of anti-competitive conduct. *Id.* *ntta.com* respectfully suggests that the "risk" these safeguards are intended to address remains unclear, especially considering actual operating experience in the WTO environment. Such restrictions should be applied only in instances of proven anti-competitive conduct, which can be identified through the general Part 43 reporting requirements.

19/ At present, the only significant differences between the international regulatory regime for "dominant" and "non-dominant" carriers are the structural separation rules, certain filing requirements, and the No Special Concessions rule. 47 C.F.R. §§ 63.10, 63.14.

Commission has recognized that the growth of competition should exert discipline even in countries that have not made such commitments. 20/ In this new context, it is unnecessary for the Commission to specially categorize U.S. carriers on the basis of the size of their foreign affiliates based in WTO member countries. 21/ The Commission should reaffirm the U.S. commitment to WTO principles by relying upon the WTO Agreement and the GATS enforcement mechanisms and by imposing special restrictions on a carrier only upon an affirmative finding that it has engaged in anti-competitive conduct.

II. THE COMMISSION SHOULD ELIMINATE RESTRICTIONS ON ISR WITH RESPECT TO WTO MEMBER COUNTRIES.

As the Commission itself has recognized, ISR is a potent, market-based means of driving down accounting rates. 22/ Thus, the current policy of permitting ISR only *after* a low accounting rate is in place has it backwards. Instead, ISR

20/ “After January 1, 1998, the largest telecommunications markets in the world will be open to competition, and we expect that new international carriers will develop in many of those markets. Those carriers and their governments will likely pressure foreign governments that have not liberalized not to tolerate anticompetitive abuses. We also expect that, as members of the global trading regime, WTO Members will be subject to this pressure to a greater degree than non-WTO countries. A key consideration is that, as countries that have not made commitments begin to liberalize, the GATS obligations that apply to all WTO Members will require WTO Members to treat foreign carriers from different countries in the same manner.” *Foreign Participation Order*, 12 FCC Rcd at 23,908.

21/ For example, as stated above, Japan has never classified carriers based upon the nature of their foreign affiliates.

22/ See, e.g., *Policy Statement on International Accounting Rate Reform*, 11 FCC Rcd 3146, 3147 (1996).

should be *encouraged* in order to provide a competitive alternative on routes with high accounting rates, such that it actually serves as the mechanism to drive those rates down.

While *ntta.com* supports the Commission's concept, expressed in the NPRM, of permitting ISR on more routes, 23/ it respectfully submits that the Commission should consider a broader reform. U.S. consumers should not be denied the benefits of this pro-competitive tool out of a theoretical concern about one-way bypass. 24/ Rather, the Commission should consider eliminating *all* restrictions on ISR, as well as the need to have ISR routes approved in advance. The Commission can rely upon general Part 43 reporting requirements to identify one-way bypass that injures U.S. consumers, and it has the power to address such a problem if it ever develops. Several countries, including Japan, have eliminated virtually all limitations on the ability of carriers to offer ISR.

Indeed, limitations on ISR may well result in a market access restriction that violates requirements of the WTO Agreement and the GATS. 25/

23/ NPRM at ¶ 38.

24/ The Commission has been reluctant to liberalize ISR in the past due to a theoretical concern that foreign monopoly carriers could exploit it to engage in one-way bypass of accounting rates subject to the ISP. *See, e.g., Foreign Participation Order*, 12 FCC Rcd at 23,927. Such concerns, however, have not hindered other WTO member countries in permitting ISR across the board, as discussed below.

25/ *See generally* GATS, Annex 1B, 33 I.L.M. at 1179 (Art. XVI, Market Access); *see also Fourth Protocol to the GATS, United States Schedule of Specific Commitments*, Supp. 2 (April 11, 1997) (commitment to eliminate limitations on

[Footnote continued]

Even the Commission's more narrow proposal to limit ISR to a certain percentage of traffic could restrict competition and might be unfair to new entrants. ^{26/} Rather than assuming in advance that ISR liberalization will automatically lead to one-way bypass, the Commission may wish to reserve the right to take corrective action in the event that ISR leads to a substantial change in the ratio of inbound/outbound traffic.

CONCLUSION

The Commission developed many of its current rules governing international services in a pre-WTO environment. The prophylactic restrictions which were necessary in that era, including the ISP, restrictions on ISR, and special restrictions applicable to affiliates of foreign carriers based upon a concept of "market power," no longer appear to be required. Indeed, these rules actually may restrict growth of the very competition that would best advance the Commission's policy goals and which the WTO Agreement is intended to promote. Accordingly, the Commission should consider eliminating these restrictions with respect to WTO countries. The Commission should improve its enforcement procedures so that it

[Footnote continued]

access to market for voice services) (available on the Internet at <http://www.wto.org/wto/new/gbtoff.htm>).

^{26/} NPRM at ¶ 38.

can employ these types of restrictions, if necessary, as a remedy for *proven* anti-competitive conduct.

By eliminating the foregoing restraints, the Commission will demonstrate its real commitment to WTO principles. To do otherwise risks creating a perception that the Commission distrusts the WTO Agreement and doubts the commitments of other members, which may in turn shake the confidence of other countries in this agreement that is so vital to the development of the global telecommunications marketplace.

Respectfully submitted,

ntta.com, inc.

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Dated: September 16, 1998

CERTIFICATE OF SERVICE

I, Gayle Hall, a legal secretary with the law firm of Hogan & Hartson L.L.P., hereby certify that on this 16th day of September, 1998, a copy of the foregoing Comments of *ntta.com, inc.* in IB Docket No. 98-148, 1998 Biennial Review -- Reform of the International Settlements Policy and Associated Filing Requirements and CC Docket No. 90-337, Regulation of International Accounting Rules, was delivered by hand to the parties listed below.


Gayle Hall

Dated: September 16, 1998

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**/ A copy of *ntta.com*'s comments on computer diskette are also being delivered to these parties as required by the Notice of Proposed Rulemaking issued in these proceedings.